IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.208 OF 2006

IN

NOTICE OF MOTION NO.5748 OF 2000

IN

L.C.SUIT NO.6775 OF 2000

WITH

CIVIL APPLICATION NO.287 OF 2006

Abdul Rahim Khan & Ors. ...Appellants

Versus

Ibrahim Pir Bhai Shaikh & Ors. ...Respondents

.....

Mr.Anil Singh with Mr.D.R.Shah for Appellants.

Mr.Kiran Jain i/b Kiran Jain & Co. for

Respondents 1 to 10 & 12 to 21.

.....

CORAM: A.M.KHANWILKAR, J.

APRIL 20, 2006.

P.C.

1. Heard Counsel for the parties.

2. Admit. Mr.Jain waives notice for

Respondents 1 to 10 & 12 to 21. Respondents 22 to 24 are original Plaintiffs and made formal Respondents. Respondent No.11 is reported to be dead. Counsel for the Appellants prays for leave to amend to delete Respondent No.11. That oral request is accepted. Amendment to be carried out in the course of the day.

3. As short question is involved, Appeal is taken up for final disposal forthwith, by consent.

4. This Appeal from Order takes exception to the Judgment and Order passed by the City Civil Court, Bombay dated February 14, 2006 in Notice of Motion No.5748 of 2000 dismissing the Notice of Motion preferred by the Appellants/Plaintiffs for interim relief during the pendency of the Suit.

5. For the final order that I propose to pass in this Appeal, it is not necessary to elaborate and deal with all the facts and circumstances of the case. Suffice it to observe that the Trial Court by the impugned Judgement has dismissed the Notice of Motion on the sole consideration that

after the rejection of prayer for ad-interim relief in the Notice of Motion, the Appellants/Plaintiffs have not brought on record any subsequent development or incident to indicate that similar trouble cropped up during the pendency of the Notice of Motion. The Court has then observed that the Suit has now ripe for framing of issues and recording of evidence. Indeed, in Paragraph 4, the Court has adverted to the fact that permission has been granted by the Authorities in favour of the Defendants with regard to the suit structure which is part of the record. It is on this basis the Court proceeded to reject the Notice of Motion.

6. The grievance before this Court is that the Trial Court completely misdirected itself in deciding the Notice of Motion on such considerations. The fact that ad-interim relief was refused at the initial stage of the Notice of Motion, cannot be the basis to straight away dismiss the Notice of Motion and more so on the reasoning that the Plaintiffs have not produced on record any material to indicate subsequent development. Counsel for the contesting

Respondents, however, submits that, that was not the only submission canvassed by the Defendants before the Trial Court. The Defendants had also relied on the materials on record to submit that no prima facie case was made out by the Plaintiffs.

7. However, even on fair reading of the Judgment, which is impugned in this Appeal, it is not possible to take the view that the Trial Court has made reference to all the submissions of the parties, in particular, of the Respondents on merits. Whereas, the Trial Court has proceeded to reject the Notice of Motion essentially being swayed away by the fact that ad-interim relief was refused on the earlier occasion and the Plaintiffs have not placed on record any subsequent developments during the pendency of the Notice of Motion to persuade the Court to grant relief as prayed in the Notice of Motion. This is not the correct approach. The fact that ad-interim relief is refused, cannot be the sole criteria for dismissing the Notice of Motion. While considering the Notice of Motion for final hearing, the Trial Court is not only expected to advert to the

pleadings of the parties but also the submissions canvassed across the bar and answer the relevant issues that may arise for consideration.

8. The appropriate course, in my opinion, is to set-aside the impugned Judgement and order and relegate the parties before the Trial Court for re-hearing of the Notice of Motion afresh to be decided on its own merits in accordance with law. Counsel for the contesting Respondents, however, submits that now the Suit is ready for framing of issues and recording evidence. Instead of directing the Trial Court to decide the Notice of Motion, the Trial Court may be directed to expedite the hearing of the Suit. Counsel for the Appellants/Plaintiffs however submits that after the rejection of prayer for ad-interim relief, the Charity Commissioner has already ruled that the property in question is trust property and which fact will have to be reckoned by the Trial Court. The request for expediting the Suit without requiring the Trial Court to hear the Notice of Motion is therefore opposed by the Appellants.

9. In my opinion, having regard to the fact situation of the present case, there is no propriety in requiring the Trial Court to proceed with the Suit expeditiously before the Notice of Motion is finally disposed of one way or the other, as, for the reasons already recorded earlier, the Judgment in the Appeal cannot be sustained.

10. Instead of examining all the contentious issues before this Court, the appropriate course is, therefore, to relegate the parties before the Trial Court for fresh hearing of the Notice of Motion on merits in accordance with law.

11. Accordingly this Appeal succeeds. The impugned Judgment and Order is set-aside. Instead, the Notice of Motion No.5748 of 2000 in L.C.Suit No.6775 of 2000 is restored to the Trial Court for expeditious disposal, preferably by end of June 2006. All questions arising therein will have to be decided on its own merits in accordance with law, uninfluenced by the observations in the impugned order or for that matter, the present order.

12. Parties to appear before the Trial Court on 4th May 2006, so as to enable the Trial Court to fix the Notice of Motion for hearing, keeping in mind that it has to be disposed of by end of June 2006.

13. Appeal and the accompanying Civil Application stand disposed of on the above terms.

A.M.KHANWILKAR, J.